No. 4359.

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

LUTHER WEEDIN, as Commissioner of Immigration at the Port of Seattle, Washington,

Appellant,

vs.

TAYOKICHI YAMADA,

Appellee.

Appeal from the United States District Court for the Western District of Washington, Northern Division

HONORABLE JEREMIAH NETERER, *Judge.*

Brief of Appellee

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THE IVY PRESS, SEATTLE

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STATEMENT OF THE CASE.

Tayokichi Yamada, a Japanese born in Japan and a subject of the Empire of Japan, lawfully entered the United States on or about September 10th, 1902. He lived continuously in the United States until February 2nd, 1907, on which date he pleaded guilty to the crime of assault with a deadly

weapon and was sentenced by the Superior Court of the State of Washington for King County to serve a term of two years in the Washington State Penitentiary.

On May 1, 1908, he was paroled from the said State Penitentiary, and immediately resumed his residence in the City of Seattle, where he continued to reside until about the month of September, 1913, when he made a trip to Japan for the express purpose of visiting his aged parents. When he made this trip to Japan, under the statute then in force, being the Act of February 5th, 1907, he could not have been deported for the commission of the aforementioned crime, because more than three years had elapsed from the date of his release from the Penitentiary. He returned to the United States on May 21, 1914, bearing a lawful passport from the Imperial Consul of Japan and was admitted at the Port of Seattle as a "non-immigrant." Ever since his return he has resided in the City of Seattle, has married and is the father of two children, native-born subjects of the United States.

On February 19th, 1924, a warrant of arrest was issued by the Secretary of Labor, under which Yamada was arrested, and after a hearing and appeal to the Secretary of Labor, was ordered deported

on the ground "that he has been convicted of and admits the commission of a felony, or other crime or misdemeanor involving moral turpitude prior to his entry into the United States, to-wit: Assault with a deadly weapon." His application for a writ of Habeas Corpus was granted and he was discharged by Judge Neterer, District Judge.

ARGUMENT.

In this case, the question as to whether or not the deportation proceeding must have been instituted within five years after the date of entry—or concluded within five years after said date—is not involved, for the reason that this proceeding was not instituted for ten years after the date of appellee's re-entry into the United States in 1914. Two questions are involved.

1. Does the appellee belong to one of the classes excluded by law under the provisions of Section 3 of the Act of February 5th, 1917?

2. Does the five-year limitation, provided in Section 19 of the Act of February 5th, 1917, apply to appellee?

We will discuss these questions in inverse order for the reason that the Government has discussed

them in that order in its brief.

Section 3 of the Act of February 5th, 1917, provides as follows:

> "The following classes of aliens shall be excluded from admission into the United States: * * * Persons who have been convicted of or admit having committed a felony or other crime or misdemeanor involving moral turpitude * *." Section 19 of the same Act provides as follows:
>
> "At any time within five years after entry, any alien who at the time of entry was a member of one or more of the classes excluded by law; * * * shall, upon the warrant of the Secretary of Labor, be taken into custody and deported * * *."

We insist that the case of *Hughes vs. Tropello*, 296 Federal, page 306, is conclusive of the question. In that case, the alien arrived at the Port of New York on November 12th, 1915, and, after examination, an order of exclusion was executed for his deportation on the ground that he was feeble-minded and likely to become a public charge. A little later, upon giving a bond, he was permitted to enter the United States and resided therein until on April 19th, 1919; a warrant of arrest was issued and he was taken into custody. On April 5th, 1921, he was ordered deported and a writ of Habeas Corpus was issued, upon the hearing of which he was discharged.

It will be seen that Tropello and Yamada, the

appellee, both come within the five-year limitation fixed in the first three lines of Section 19 of the Act of February 5th, 1917, for the reason that they both belonged to the classes excluded by law, so that the language of the Court in the *Tropello* case applies with equal force to the *Yamada* case.

In passing upon the right of the Government to deport an alien of the excluded classes, after the five-year limitation had expired, the Court said:

> "It would seem clear that where the right of exclusion exists, but the right is waived by the department for any reason, and the alien is allowed to enter the country, whatever the conditions imposed, the case at once is taken out of the procedure for exclusion and is governed by the procedure relating to the expulsion and deportation of an alien found in the United States contrary to law. To this last named class, the statute of limitations applies. Section 19 designates, both generally and particularly, the aliens in the United States who are subject to be taken into custody and deported, not only those who have entered, or are found in the country, in violation of that act, but in violation of any other law of the United States. This section does not undertake to prescribe the method of procedure, what hearing shall be had, if any, or before whom. The section is concerned only in designating the aliens who may be deported, and in fixing a time limit within which such deportation must be made. The effective words are:
>
> > 'That at any time within five years after entry, any alien (specifying the various classes unlawfully entering or found

in the United States) shall, upon a warrant of the Secretary of Labor, be taken into custody and deported.'

"It must be clear that, inasmuch as this section embraces every possible case where deportation can be had, the five-year limit therein fixed must prevail, unless such limitation is removed by an exception specified therein; and we find such exception embracing a large number of cases in section 19.

"To better understand the meaning and effect of certain words in Section 20 (section 4289¼k), which have caused some conflict of opinion as to the five year limitation, it becomes necessary to keep in mind that section 19 is dealing with two classes of aliens, whose status before the law is entirely different, but who together constitute all the deportable cases. *The first class embraces those who had no right to enter the country, who were not admissible under the law, who ought to have been excluded but who have entered the country, or are found therein, in violation of the law. The status of all this class is fixed, unalterably, as of the date of arrival at port.* The second class embraces those whose admission into the United States was lawful, against whose status, at that time, physically, mentally, or morally, the law could raise no objection, but whose subsequent conduct was such as to forfeit their right, under the law, to remain. The status of this class is fixed, not as of the date of arrival, but as of the date when the offense was committed, or the conditions were found to exist, which forfeited their right of residence." (The italics are ours.)

Yamada, belonging to the first class mentioned in the above case, his status is unalterably fixed as

of the date of his re-entry into the United States in 1914, and the proceeding, not having been instituted for ten years thereafter, the limitation runs.

Another case in point is *United States vs. Tod,* 289 Federal, page 60. In that case both aliens belonged to the classes excluded by law, and the question passed upon by the Court was whether it was sufficient if the deportation proceeding was begun within five years after the date of entry. In passing upon the question as to whether the five year limitation applied the Court said:

> "Both these aliens belonged to classes which must under section 19 be 'taken into custody and deported' within 'five years after entry.'"

Again we have appellee belonging to the same class as the aliens involved, and again we have a ruling that the five-year limitation applies to him.

This Court in the case of *Ono vs. United States,* 267 Federal, page 359, recognized that the five-year limitation applied to the excluded classes of aliens. Ono, a Japanese, an unskilled laborer, unlawfully entered the United States, deserting from a ship, upon which he was employed as a coal passer, on March 1st, 1915. Under the provisions of the Act of February 20th, 1907, he belonged to the classes excluded by law. In holding that the Government

had the right to deport Ono within five years after his entry, this Court said:

> "Belonging, as the appellant clearly did, to a class, to-wit, that of unskilled laborers, denied the right of entry into the United States by virtue of the Act of February 20, 1907, and the presidential proclamations promulgated under and pursuant thereto that have been set out, he was by the express provision of Section 19 of the Act of February 5, 1917, (39 Stat. 874, 889 [Comp. St. 1918, Comp. St. Ann. Supp. 1919, Sec. 4289¼jj]), subject to deportation at any time within five years from the time of his entry."

Yamada, belonging to one of the excluded classes, the limitation fixed by this Court in the *Ono* case applies to the instant case.

The Government cites and relies upon the cases of *Lauria vs. United States*, 271 Federal, page 261, and *Guiney vs. Bonham*, 261 Federal, page 582. In the *Lauria* case the alien, after having been once deported, re-entered the United States on December 27th, 1914. At that time, he was admittedly guilty of a felony involving moral turpitude. He was taken into custody on a warrant of arrest dated December 10th, 1919, and was ordered deported. The sole contention made by Lauria was that the deportation proceedings must have been concluded within five years after his re-entry into the United States. In passing upon that point, the Court said:

> "To so construe the act as to require the apprehension and taking into custody and deporting the emigrant prior to the five year limitation, would be to disregard some of the provisions of section 19 and would lead to conclusions which would be dangerous to the public."

That was the only point before the Court and the only point necessary of decision. In distinguishing the *Lauria* case from the instant case Judge Neterer said:

> "The issue in the instant case is distinguished from that in the *Lauria* case in that this proceeding was not instituted within five years from date of entry. The court in the *Lauria* case is right in saying that the Congress intended to classify the aliens and to limit deportation to the particular classes, and that Lauria was within the provision of the act; but the language of the Court is *obiter dictum* in saying that a person convicted of a crime involving moral turpitude prior to entry can be deported under the Act of 1917 *at any time.* Section 19 deals with two classes of aliens; the first is those who have no right to enter; the second class, those whose admission was lawful but whose subsequent conduct forfeited the right to remain. The five-year limitation of the first class began at the date of entry, and the five-year limitation period of the second class began at the time of the commission of, or conviction of the inhibited crime. This is the view expressed by the Court of Appeals of the Third Circuit in *Hughes vs. Tropello, supra.* The petitioner is of the first class."
>
> Transcript pages 14-15.

We can add little to what Judge Neterer has said. Investigation discloses that, from the very beginning, the Congress have attached a period of limitation beyond which aliens can not be deported; first, one year, then two years, then three years and finally five years.

We submit that the construction of the Act of February 5th, 1917, in the *Lauria* case is strained, unjustifiable and unnecessary to the decision of the case. We believe that the Act in plain words says that an alien in the situation of the petitioner must be deported within five years after his entry.

The case of *Guiney vs. Bonham, supra,* is not in point. In that case the alien lawfully entered the United States, and thereafter by his conduct forfeited his right to remain, and was ordered deported. He, therefore, does not come within the same class as Yamada, because his status was not unalterably fixed at the date of his entry.

The Government claims the right to deport Yamada upon the ground that, prior to his entry into the United States, he had committed a crime involving moral turpitude. Because of that, the Government claims the right to deport him at any time, however far distant from the time of entry,

during which long period he may have been living a life of rectitude.

It must be admitted that, under the plain terms of the Act, if the alien committed a like crime against the laws of the United States, proceedings to deport him would have to be instituted within the limit of five years after the commission of the crime. Why should the Congress be inclined to treat with more indulgence or less severity an offense against its own sovereignty than a like offense committed against the laws of some foreign government? To so construe the Act would seem to convict the Congress of an absurdity.

We submit that the limitation fixed in the Immigration acts have twice run in Yamada's case. First, the three-year limitation applicable under the Act of 1907, which ran before Yamada temporarily left the United States in 1913; and second, since he re-entered the United States in 1914, a period of ten years elapsing before the beginning of the proceeding to deport.

WAS THE APPELLEE AT THE TIME OF HIS RE-ENTRY IN 1914 GUILTY OF THE COMMISSION OF A CRIME INVOLVING MORAL TURPITUDE?

Yamada admits that on February 2nd, 1907, he pleaded guilty to the charge of assault with a deadly weapon, and was sentenced to serve two years in Walla Walla. Our contention is that the commission of the crime of assault with a deadly weapon does not necessarily involve moral turpitude. The Government relies upon the case of *Russeau vs. Weedin,* 284 Federal, page 565, decided by Your Honors on November 20th, 1922. We believe that case to be in favor of our contention, and will discuss it later in the light of other decisions cited by us. A universally-accepted definition of moral turpitude is as follows:

> "Moral turpitude is defined to be an act of baseness, vileness or depravity in the private and social duties which a man owes to his fellow men or to society in general." 20 Amer. and Eng. Enc. Law, page 872.

We are unable to see any reason why Yamada should be deemed guilty of baseness, vileness, depravity, etc. Many circumstances may arise in the crime of which the petitioner was guilty which would take him outside of the above definition. Two men might, without any previous intent, engage in

an argument resulting in blows; and one might seize a stick or other weapon and inflict injuries on the other. It could hardly be said that, under such circumstances, he was guilty of moral turpitude.

As was said by the Supreme Court of Alabama, in the case of *Gillman vs. State,* 51 Southern, page 722:

> "A mere assault and battery case does not involve moral turpitude. Moral turpitude signifies an inherent quality of baseness, vileness, depravity. Assaults and batteries are frequently the result of transient ebullitions of passion, to which a high order of men are liable, and do not necessarily involve any inherent element of moral turpitude."

Again in *McCuen vs. Ludlum,* 17 New Jersey Law Reports, page 12, the Court said:

> "An assault and battery is a crime *malum in se,* the commission of which rarely involves moral turpitude."

In the case of *Pollock vs. State,* 101 South Western, page 231 (Texas), the Court said:

> "Fighting is not an offense under the laws of this State that involves moral turpitude."

We believe that the Supreme Court of the State of Washington in the case of *In Re Hopkins,* 54 Washington, page 569, uses the same line of reasoning that Your Honors did in the *Russeau* case, *supra.* In that case the Court said:

"These acts upon which the conviction of appellant was had in the Federal Court constitute a grave offense against the pension laws of the United States, punishable by a fine not exceeding $500, or by imprisonment for a term of not more than five years. *U. S. Rev. Stats.* Sec. 4746. The gravity of the offense is thus indicated, though it may be conceded this does not determine the question of its involving moral turpitude. That question, after all, must be determined from the inherent immoral nature of the act, rather than from the degree of punishment which the statute law imposes therefor, though the latter may be some indication of the public conscience relating thereto.

"Bouvier, in his Law Dictionary says: 'Everything done contrary to justice, honesty, modesty, or good morals is said to be done with turpitude;' while Anderson's Dictionary of the Law defines turpitude as, 'Doing a thing against good morals, honesty or justice; unlawful conduct; infamy.'

"The Supreme Court of Pennsylvania, in the case of *Beck vs. Stitzel,* 21 Pa. St. 522, 524, refers to moral turpitude in this language:

" 'This element of moral turpitude is necessarily adaptive; for it is itself defined by the state of public morals, and thus far fits the action to be at all times accommodated to the common sense of the community.'

"See, also, *Ex parte Mason,* 29 Ore. 18, 43 Pac. 651, 54 Am. St. 772; *In re Coffey,* 123 Cal. 522, 56 Pac. 448; *In re Kirby,* 10 S. D. 322, 39 L. R. A. 856; *Newell, Slander & Libel,* 98.

The punishment fixed by statute may indicate

the gravity of the crime of assault with a deadly weapon, but does not determine the question of its moral turpitude.

As has heretofore been said, many men of a high order may commit a crime in the heat of passion and could not be said to be guilty of moral turpitude. The element of moral turpitude must necessarily be adaptive; and we submit that the question of adaptability is the basis of the decision in the *Russeau* case, *supra*. Russeau was convicted of the crime of being a "jointist." Judge Gilbert in the opinion of the Court said:

> "The only question before this Court is whether or not the crime involves moral turpitude. We think that the Court below properly ruled that it does. The name of the crime is itself expressive of the degraded nature of the place at which the unlawful sale of intoxicating liquor is carried on. It suggests a resort of ill repute, and we think it may be affirmed that any one who wilfully opens a place for conducting a business which is positively forbidden and made punishable by law as a felony is guilty of an offense which involves moral turpitude."

It could hardly be successfully contended that a person who deliberately opened up a "joint" for the unlawful sale of intoxicating liquor could do so without being guilty of moral turpitude. Your Honors properly decided that the inherent immoral

nature of the offense was sufficient to constitute turpitude.

But the same cannot be said of assault with a deadly weapon. Manslaughter is a serious offense, carrying a heavy penalty, but no one will contend that it necessarily involves moral turpitude.

The case of *United States vs. Uhl,* 210 Federal, page 860, is strictly in point. In that case the alien prior to entry into the United States was convicted of criminal libel in Great Britain, and the authorities of the United States refused to admit him and ordered him deported because of that fact. In passing upon the question as to whether the crime he had committed prior to entry involved moral turpitude the Court said:

> "*Third.* That the law must be administered upon broad general lines and if a crime does not in its essence involve moral turpitude, a person found guilty of such crime cannot be excluded because he is shown, *aliunde* the record, to be a depraved person.
>
> "*Fourth.* That the law must be uniformly administered. It would be manifestly unjust so to construe the statute as to exclude one person and admit another where both were convicted of criminal libel, because, in the opinion of the immigration officials, the testimony in the former case showed a more aggravated offense than in the latter.
>
> "*Fifth.* That the crime of publishing a

> criminal libel does not necessarily involve moral turpitude. It may do so, but moral turpitude is not of the essence of the crime."

From this case it appears that, while the crime of which the alien was guilty might involve moral turpitude, it did not necessarily do so; and that the Court was not justified in saying that it did. In other words, moral turpitude not being of the essence of the crime, the alien was entitled to enter.

We have found no authorities holding that moral turpitude is of the essence of the crime of which petitioner was guilty; and, in the absence of such authorities, we submit that the Court cannot assume that the crime in question involved moral turpitude. The Government seeking to deport him upon the ground that he was guilty at the time of entry of a crime involving moral turpitude, must assume the burden of proving to the Court that he was guilty of such a crime. In the absence of such proof, the Government is in no position to urge his deportation.

The Government has submitted no authorities to the effect that moral turpitude is of the essence of the crime of assault with a deadly weapon, for the very good reason that they could find none. Counsel seem to contend that, under the wording of

the Act, the mere conviction or admission of the commission of a felony prior to entry is sufficient to justify deportation. A mere reading of the applicable words in Section 3 of the Act of February 5th, 1917, shows the fallacy of this contention. Included among the classes of aliens excluded by that section from admission into the United States are "persons who have been convicted of or admit having committed a felony or other crime or misdemeanor involving moral turpitude." This language clearly means that any alien who was convicted of or admits the commission, prior to entry, of a felony, crime or misdemeanor involving moral turpitude shall be excluded; and, if improperly admitted, shall be deported under the terms of Section 19 of the Act. Otherwise the Congress would have used the word "any" instead of the word "other," making the clause read as follows: "Persons who have been convicted of or admit having committed a felony or *any* crime or misdemeanor involving moral turpitude." As the Act now reads the words "involving moral turpitude" clearly refer to a felony, crime or misdemeanor committed prior to entry.

In conclusion we submit: First, that appellee at the time of his re-entry in 1914 was not guilty of the commission of a crime involving moral tur-

pitude, and therefore did not belong to the classes excluded by the provisions of Section 3 of the Act of February 5th, 1917. Second, that, if it could be said that he belonged to the excluded classes, his status was unalterably fixed as of the date of his re-entry in 1914 and that the five-year limitation applies.

Respectfully submitted,

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